No. 15,183

In the

United States Court of Appeals

For the Ninth Circuit

HERBERT CAMPOS,
Plaintiff and Appellant,

v.

CARL E. OLSON, also known as CARL "BOBO" OLSON; SID E. FLAHERTY; SID FLAHERTY PROMOTIONAL ENTERPRISES, a corporation, et al.,
Defendants and Appellees.

Reply Brief of Appellant, Herbert Campos

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We will herein briefly answer some of the arguments raised by Appellees' brief.

A. The Argument that the Contracts Were Mutually Abandoned.

Appellees' view that the July 14, 1948 contract (Exhibit 2, R. 61) and the July 20, 1949 contract (Exhibit 8, R. 99) between Campos and Olson were mutually abandoned is insupportable. In spite of appellees' depreciatory picture of Olson while under Campos' management, Olson was steadily improving as a boxer at that time. A fighter as unpromising as that depicted certainly would not be told by Flaherty that Flaherty had a good contract on him (R. 244), have his travel expenses from Hawaii to San Francisco

advanced (R. 240) and upon arrival in San Francisco immediately fight under Flaherty's management (Exhibit 5; R. 312). The discouragement from the mainland that Olson was not desirable as a fighter came from Flaherty (Exhibit 30, R. 122).

In view of all that happened prior to the June 19, 1951 Commission meeting and what was said at that meeting, there was no abandonment nor was any intended. In the attempt to show abandonment Olson is pictured going to the mainland, securing the services of a manager and fighting his way to the world's championship while Campos does nothing. Campos' letter of June 27, 1951 to the Territorial Boxing Commission (Exhibit 19, R. 78), his radiogram of July 6, 1951 to the California State Athletic Commission (Exhibit 21, R. 81) and his letter of October 8, 1951 to the Territorial Boxing Commission (Exhibit 22, R. 82) are not from a person who has recently abandoned a contract. The replies (Exhibit 20, R. 80; Exhibit 23, R. 83) to these letters do not describe abandoned contracts.

Prior to this meeting Olson told Campos he was leaving (R. 249) and his letter of June 13, 1951 to the Commission (Exhibit 35, R. 244-248) stated Campos knew this. The only abandonment shown by these undisputed facts is Olson's unilateral abandonment. Olson's repudiation of the contracts was not an offer of rescission (5 Corbin on Contracts, Sec. 1236, p. 961).

B. The Argument That the Contracts Were Not Breached.

Campos' consent to Olson's leaving Hawaii was conditional. He "could go to the mainland provided that I had my contract rights" (R. 119).[1] Campos' statement was, of course, made after Olson had talked with Miles about going

1. See also Stagbar's testimony (R. 222-223) to the same effect.

back to Flaherty (R. 239), written Flaherty (R. 242), offered Campos $6,000.00 for the contracts (R. 407-408), told Campos he was leaving for the mainland (R. 249), told Miles the same thing (R. 251), had been told by Flaherty that Flaherty had a good contract on him (R. 244) and written the Territorial Boxing Commission he was leaving (Exhibit 35, R. 244-248). To assert there was no breach of contract under these conditions because Campos consented to Olson's leaving simply disregards all the realities of the situation.

Appellees would have Campos require Olson to perform the contracts after June, 1951 and state there is no evidence Olson would not have performed. This naively ignores Olson's June 13, 1951 letter[2] to the Territorial Boxing Commission of Hawaii.

> "My territorial manager *knew that I was scheduled to leave for the mainland to fulfill an engagement with my legal mainland manager, Sid Flaherty, immediately after the bout with Hunter on June 19th.* * * * I hereby state of my own free will *that I will not be available for further matches in the Territory until further notice by myself.*" (Exhibit 35, R. 244-248, emphasis ours)

Olson's repudiation of the contracts excused Campos from further performance and such defense is not available to Olson (12 Cal. Jur. 2d 452-453, 462).

In *Alderson v. Houston* (1908), 154 Cal. 1, the defendant repudiated the contract with plaintiff. The Supreme Court

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2. Inadvertently dated June 31, 1951 in Appellees' Reply Brief at page 23.

stated that defendant's breach discharged the plaintiffs from performance of any of the conditions on their part (Id. p. 10). The Court also pointed out plaintiff's remedy is to sue immediately for his prospective damage or, in the alternative, wait until the expiration of the time of performance and then sue for damage.

Other authorities for this proposition are *Taylor v. Sapritch* (1940), 38 C.A. 2d 478, 481 and *Bewich v. Meeham* (1945), 26 C.2d 92, 99.

C. The Argument That Anticipatory Breach Does Not Apply.

The evidence on anticipatory breach is so clear in this case that little further comment is necessary. The June 13, 1951 letter (Exhibit 35, R. 244-248) speaks for itself. Prior to that Olson told Campos he was quitting (R. 249). Olson then left and went to San Francisco (R. 404) and to Flaherty (R. 252). These acts constituted anticipatory repudiation (*Restatement of Contracts,* Sec. 318; *Gold Mining and Water Co. v. Swinerton* (1943), 23 C.2d 19, 29).

The cases on anticipatory repudiation are clear that the bringing of suit is sufficient election to treat the repudiation as a breach (*Crown Products Company v. California Foods Corp.* (1947), 77 C.A. 2d 543, 551). The case cited by appellees, *Robinson v. Raquet* (1934), 1 C.A. 2d 533 for the proposition that repudiation is not effective unless it is unequivocally accepted by the promisee, states the rule in full:

"Repudiation, or renunciation, as the term is more generally used, is but an act or declaration in advance of any actual breach, and consists usually of an absolute and unequivocal declaration or act amounting to a declaration on the part of a promisor to the promisee that he will not make performance on a future day at which the contract calls for performance. It is in the nature of an antici-

patory breach before performance is due, but *does not operate as an anticipatory breach unless the promisee elects to treat the repudiation as a breach and brings suit for damages* [citations]" (Id. pp. 542-543, emphasis ours). Campos treated Olson's repudiation as a breach in bringing a suit for damages.

D. The Argument That There Was No Interference With Contractual Relations.

The tort is *interference* with a contract (Prosser on Torts, 977). It is defined in Section 766 of the Restatement of Torts and *Romano v. Wilbur Ellis & Co.* (1947), 82 C.A. 2d 670 which latter case stated if defendant "enters into a contract with a person, who is already under contract with the plaintiff, *with knowledge or surmise of the existence of the prior contract, and of the fact that performance to the defendant will prevent performance to the plaintiff,*" he should be liable for inducing breach of contract (Id. p. 673, emphasis ours). The evidence shows Flaherty had knowledge of the Olson-Campos contractual relationship in the middle of 1948 (R. 320-321); Flaherty's close friend Miles was advising Olson (R. 251) and advancing money to him (R. 240); Flaherty told Olson about his good contract on Olson (R. 244); Flaherty arranged with Miles to pay Olson's transportation to San Francisco (R. 319). It is true there is no admission by Flaherty of his activities interfering with these contracts, but such evidence would hardly be forthcoming. "Far fetched conjecture" is a cunning description of this evidence in this case which clearly confutes Flaherty's innocence.

The statute of limitations is inapplicable. The Trial Court made no findings concerning the statute of limitations nor were any proposed by the defendants (see Findings of Fact

lodged by defendants, Record on Appeal). The Trial Court's findings of fact were based substantially upon those proposed by the defendants.

As a matter of law failure to find a fact essential to a recovery is equivalent to a finding against the party having the burden of proving the same. (*Container Patents Corporation v. Stant* (1944, 7 Cir.), 143 F.2d 170, 172). The burden of proof of establishing the defense of the statute of limitations rests upon the defendants (*Ware v. Heller* (1944), 63 C.A. 2d 817, 829).

Defendants' revived interest in the statute of limitations is an unwarranted attempt to mend its hold on the appeal after failing to exercise their rights in the District Court and should not be countenanced by this Court (*Kennedy v. United States* (1940, 9 Cir.), 115 F.2d 624, 625).

Independent of this situation the statute of limitations does not bar this action. Flaherty's interference prior to July 19, 1951 resulted in Olson's leaving Hawaii and reporting to Flaherty in San Francisco. The cause of action arose in Hawaii (Rest. of Conflicts, Sec. 377), the place where the incidental right of protection is injured (2 *Beale, Conflict of Laws* 1287. See also, *Goodrich on Conflict of Laws* 263, 264.) At the time of this wrong plaintiff Campos resided in Hawaii and defendant Flaherty resided in California (R. 49). The absence of Flaherty tolled the Hawaiian statute of limitations[3] of which this Court may take judicial notice

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3. *Sec. 10434:* "If at any time when any cause of action specified in part 1 of this chapter shall accrue against any person, he shall be out of the Territory, such action may be commenced within the terms herein respectively limited, after the return of such person into the Territory, and if, after such cause of action shall have accrued, such person shall depart from and reside out of the Territory, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action" (*Revised Laws of Hawaii,* 1945).

(*Breed v. Northern Pacific Railroad* (1888, Cir. Ct., D. Minn.), 35 Fed. 642, 643; 31 C.J.S. 524; 20 Am. Jur. 62). California's statute is to the same effect (*Code of Civil Procedure,* Sec. 351). Flaherty's absence from Hawaii during this time prevented personal service of an Hawaiian action upon him and for this reason (the one underlying the statute) tolled the statute (*Irving National Bank v. Law* (1926, 2 Cir.), 10 F.2d 721 reversing prior opinion in 9 F.2d 536).

Completing the answer to appellees' argument on this point—which statute of limitation applies? Appellees assert the two year statute does. But *Romano v. Wilbur Ellis & Co.* (1947), 82 C.A. 2d 670 squarely holds that the three year period of Section 338(4) of the *Code of Civil Procedure* controls on the theory that the gist of such action is constructive fraud.

> "This is not an action for breach of contract between appellant and Pesquera. The latter is not a party to the action. The suit is for damages for fraud. *The accepted rule of the cases hereinabove cited is that the gist of this type of action is fraud.* Section 1573 of the Civil Code provides: 'Constructive fraud consists:
>
> > '1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him.' " (Id. p. 673, emphasis ours)

The important consideration, however, is that any cause of action for inducing breach of contract against Flaherty on the facts of this case arising within the applicable statutory period prior to the commencement of the present suit is obviously not barred. The five-year contract of July 14, 1948 did not expire by its terms until July 18, 1953 and the ten-year agreement of July 20, 1949 provided that it should

remain in effect until July 19, 1959. The actionable interference by Flaherty with these contracts has continued consistently from July 9, 1951 up to the present time.

In *Lumley v. Gye* (1853), 2 El. & Bl. 216, 118 Eng. Rep. 749, 1 Eng. Rul. Cas. 707 Justice Crompton found the tort to be a continuing one when he stated the rule as follows:

> "* * * it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it and *during the time stipulated for as the period of service*, whereby the master is injured, commits a wrongful act for which he is responsible at law." (Id. 2 El. & Bl. 216 at 224, 118 Eng. Rep. 749 at 752-753, emphasis ours)

Injunction to restrain a continuing interference with contract rights is generally a proper remedy under the authorities and the mere fact that this is an action for damages does not change the complexion or character of the wrong. The rule is stated as follows at 54 C.J.S. 127 in Section 169 of "Limitations of Actions":

> "Subject to rules governing single or successive suits, it may be broadly stated that, where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury, or when the tortious overt acts cease. In this connection it has been said that one should not be allowed to acquire a prescriptive right to continue a wrongful act."

Cited in Corpus Juris in support of the foregoing text is the closely analogous case of *Cain v. Universal Pictures Co., Inc.*, (1942, Dist. Ct., S.D. Cal. Cent. Div., 47 F. Supp.

1013). There the suit was for infringement of copyright in appropriating literary material and including it in a motion picture. Taylor, the scenario writer who adopted the material from plaintiff's novel for the purposes of the picture, was joined as a defendant and he raised the two year statute of limitations, Section 339(1), upon the ground that more than two years had elapsed prior to the commencement of the action since the adaptation and release of the picture—his part in the original tort. However, the Court held that the action was not barred as to Taylor, saying:

> "The material was intended by him to be used in the motion picture to be produced from the story, *which was to be exhibited to the public on its completion and release.*
>
> "So the wrong done to the plaintiff in a case of this character does not lie in the mere copying of his material, which, without publication or incorporation into a motion picture, would result in no injury to him. It consists of (1) the deliberate appropriation of a portion of his work and its delivery to others for (2) inclusion in the finished picture and (3) exhibition to the public.
>
> "Therefore, conceding that the actual distribution of the picture, following its original release, was done by others than Taylor, the action is not barred, as to him, by the expiration of two years from the date of release. *For the continuous exhibition of the picture is one of the aims of the composition of the script by him.* He is, therefore, chargeable not only with the act of composing the screen play, but is also a participant in its incorporation into the motion picture and its subsequent exhibition. For those were the contemplated purposes inherent in his contribution. Hence the conclusion that the action as to Taylor is not barred by the statute of limitations." (Id., pp. 1017-1018, emphasis ours)

In other words, it was held in the cited case that a continuing interference with plaintiff's property rights by exhibiting the picture was not barred at the expiration of the statutory period running from the inception of the wrong. So in the present case Flaherty's continued interference with plaintiff's property rights under existing contracts is not barred until the statute runs after such interference ceases. Even with respect to the five-year contract of July 14, 1948 *standing alone,* though the invasion of plaintiff's rights may be cut off prior to June 10, 1953 if the two-year statute applies—the contract not expiring by its terms until July 18, 1953—nevertheless Flaherty remains liable in damages.

CONCLUSION

We submit that Appellees' view of the evidence and the law in this case is unsupportable. Olson's conduct prior to June 19, 1951 was a repudiation, actually and anticipatorily, of his contracts with Campos. At the June 19, 1951 meeting of the Territorial Boxing Commission there was no mutual rescission of these contracts, there was only Olson's unilateral repudiation. Flaherty's participation, from passive encouragement to active participation, in Olson's breach of these contracts is clearly set forth in the record of this case. For these reasons we submit the judgment of the District Court should be reversed.

Respectfully submitted,

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